the only mode by which such property can be effectually protected. The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trade-mark as in the case of the violation of any other right of property. First, the plaintiff must prove that he has an exclusive right to use some particular mark or symbol in connection with some manufacture or vendible commodity; and secondly, that this mark or symbol has been adopted or is used by the defendant so as to prejudice the plaintiff's custom and injure him in his trade or business:" 33 L. J. R. Ch. (1864) 199; *Hall* v. *Barrows*, 33 L. J. R. (1864) 204, 207–8.

Millington v. *Fox* is so well established that a compromise with the proprietor of a trade-mark by a brick-maker who had used it unwittingly at the instance of a customer, was considered the settlement of a legal liability, and the customer was compelled to reimburse him the amount of his expenditure: *Dixon* v. *Fawcus*, 3 E. & E. (1861) 537.

Had the learned judge in the principal case viewed the trade-mark as a right of property, it may be doubted whether he would have been prepared to go the length which Lord WESTBURY went, and forfeit the title on purely moral grounds. J. P.

Supreme Court of Vermont—General Term, Nov. 1868.

DANIELS *v.* NELSON.

The doctrine of *fraud in law* as applicable to change of title in personal property without change of possession is merely a kind of rule of evidence prescribing what facts proved shall be held to conclusively show the existence of fraud, and thus creating a kind of estoppel *in pais*.

The rule rests upon grounds of policy only, and its application has been limited to creditors and *bonâ fide* purchasers. It does not apply in favor of a state or county levying a tax.

Therefore, a chattel belonging to A. cannot be levied upon for a tax due by B., although it formerly belonged to B. and still remains in his possession.

THIS was replevin of a mare that was distrained by the defendant on a tax-warrant for a *poll-tax* against the plaintiff's father, that being the only tax against him. The County Court found the legal title to the property to be in the plaintiff, as between him and his father, by a contract made in good faith, and not fraudulent *in fact*. But the court further found and held that the ostensible ownership and possession were so far in the father as to render the mare subject to levy for the tax, even if she would not have been if the plaintiff had taken and kept the exclusive possession and claim of title in himself.

Heath & Reed, for plaintiff.

Redfield and *Gleason*, for defendant.

Opinion delivered by

BARRETT, J.—The question is directly presented, whether the doctrine of *fraud in law* is applicable in this case, so as to subject the property to the levy made. The several English statutes, the substance and spirit of which are embraced in our own, on the subject of fraudulent conveyances, are designed to protect creditors and *bonâ fide* purchasers; and the *fraud*, which gives occasion for those statutes, looks exclusively to such creditors and purchasers; and, moreover, they contemplate actual fraud, both in intent and act. The doctrine, persistently adhered to in Vermont, of *fraud in law*, does not give any additional scope either to the statutory or common-law operation of *fraud*. That doctrine works in subordination to such law, and adopts a particular mode of determining the existence of the vitiating fraud in the given case. In a sense, it propounds a kind of rule of evidence, prescribing what facts proved shall be held to show the existence of such fraud. It says to the party—Prove that there was no visible change of substantial, exclusive possession from the vendor to the vendee, and the fraud required by the law to invalidate the sale as against creditors and *bonâ fide* purchasers will be established.

In many of the states, and, at some periods, in England, the lack of such change of possession has not been allowed to have such conclusive effect; but has constituted matter of circumstantial evidence bearing on the question of actual fraud. The conclusive effect of that fact in this, and some other of the states, has been allowed and adopted as matter, and on the ground, of policy. When the ground and reason of that policy is considered, the proper extent of the application and operation of the doctrine itself will be seen.

Possession—the holding and using of an article of property in the manner of an owner—is a strongly evincive badge of ownership; and when it continues to be exercised upon property by the person who had in fact before owned it, the public and individuals would be warranted in presuming that such ownership was continuing, and in acting accordingly, without making inquiry. Indeed, very few persons would think of making inquiry as to a

change of *title*, unless some apparent change in the possession and use of the property had occurred.

The ownership of property being a leading ground and inducement for credit, as well as for confidence, in dealing with and trading for it, in order to preclude the continued possession of property from inducing an unfounded credit, or leading to a fallacious confidence in making a purchase, the law adopts a kind of conclusive *estoppel in pais*, in favor of creditors and *bonâ fide* purchasers of the former owner, his continuing in the possession and use in a manner consistent with his continuing still to be the owner of it.

It does this in order, at once and entirely, to relieve the subject of the continued possession of property by the former owner, as a ground of credit and confidence, from the embarrassment that would be likely to, and often does, result from having to settle occult questions as to the real character of transactions between the parties to the pretended transfer of title, when not accompanied by a corresponding change of possession.

In this view it may be regarded as a kind of rule of title and assurance in the pretended vendee. The propriety of the rule is well justified by commercial, as well as by judicial, experience; and we may properly continue to abide by it, as intimated by Judge MATTOCKS, in *Farnsworth* v. *Shepard*, 6 Vt. Rep. 521, notwithstanding the doubt expressed by Chancellor KENT in his Commentaries, Vol. 2, p. 526 (ed. of 1840), in noting with commendation that intimation.

Now it is obvious that the policy and final cause of the rule cannot be predicated of the case in hand. The party to which the tax is owing is not a *creditor*. The state, the town, the school district, do not give credit by way of trust and confidence. They make an authoritative and arbitrary exaction, and are armed with all the power of the state for its enforcement out of any, and all, of the property of the party taxed, extending even to the enticement of the prison walls, in lack of the property whereof to get satisfaction. In *Johnson* v. *Howard and Trustee* (Orange Co., March Term 1868), it was held that town taxes could not be deducted in diminution of the liability of the town as trustee of the defendant, under sec. 52, ch. 34, Gen. Stat.

In the present case, as before remarked, the tax was not on account of any property. It was only a poll-tax; that fact itself

indicating it to be likely enough that, not property, but only the person of the party taxed, might be reached by warrant for its compulsory collection.

The view we take of the subject, in its reasons, as developed in its history, is fully sustained by the text-books and the cases. 2 Kent's Com., from p. 515 to 552, inclusive, contains the best summary of the law of the subject that I have seen. It will be found that all the cases in Vermont, beginning with *Mott* v. *McNiel*, 1 Aik. Rep. 162, and ending with *Houston* v. *Howard*, 39 Vt. Rep. 55, treat the matter of *fraud in law*—constructive fraud—predicated upon a lack of change of possession, as originating in *policy*, and limited to creditors and *bonâ fide* purchasers without notice. The doctrine has never been better stated, both as to its grounds and its limit, and its practical operation, than it was by HUTCHINSON, J., in *Mott* v. *McNiel;* and it has not been departed from in point of principle in any subsequent case that has come to our attention. He says: "A sale of personal property, without change of possession, though it may be valid, as between the parties, is void as to creditors. It is usually termed a fraud in law. * * * This must be a visible substantial change; so that the possession will no longer give a credit to the former owner. * * * If a man actually owns and possesses personal property, the world have a right to presume he remains the owner, so long as he retains the possession. People may well give him credit on account of this property, and when they attach it for his debts, they can hold it."

The ground of the doctrine is strongly developed in *Foster* v. *McGregor*, 11 Vt. 595, by BENNETT, J., in which it was held that property exempt from attachment and execution was not subject to the rule of fraud in law, for the reason that it did not enable the vendor to acquire a false credit, nor was it against sound policy, as opening a door to fraud; and yet such property is not exempt from distress upon a tax-warrant.

As the present case does not fall within the reason of the doctrine and rule, and as no precedent is shown for applying the rule to such a case, we see no legal reason for subjecting the plaintiff's property to the compulsory payment of his father's poll-tax. No party in interest has been misled. No party in interest could be misled in such a case, by such possession and use of the property

by the plaintiff's father, with the knowledge and permission of the plaintiff, as were shown in this case.

The fact that the defendant levied on it, because of such possession and use, is no element in the law of the subject. It was an experiment on his part to get the tax satisfied. What gives potency to the lack of a change of possession, is its tendency to induce a false credit in the *creation* of claims against the former owner, who still continues in possession,—not that it may induce a party to levy final process upon it in satisfaction of his claim. The case, in this respect, bears a close analogy to one feature of *Turner* v. *Waldo*, 40 Vt. Rep. 51.

The judgment below is reversed, and judgment rendered in this court for the plaintiff.

The foregoing opinion is certainly reasoned with great fairness and clearness, and as the rule of law declared is one of policy, not altogether dependent either upon principle or analogy, it is difficult to form any very decided opinion in regard to its absolute soundness. It is a question resting too much in the discretion of the court to admit of much controversy, either in regard to its wisdom or its logic. By presuming to affirm the contrary one assumes to erect his own judgment in opposition to that of the court, which, within its sphere, is final and therefore infallible. That is all that is fairly implied in the infallibility of any person or tribunal, that its judgments are final and not subject to revision. And where, in addition to the judgment of any court being final, it is made to rest upon so undefinable a basis, as policy, it becomes impossible to measure its soundness, since we have no common standard of policy in the law until it has been established by common consent, which is not the fact as to the matter in hand.

It may be true that the person or power in whose favor a tax is assessed is not to be regarded strictly in the light of a creditor of the tax-payer. So too a party upon whom a tort is committed, before judgment in his favor, is not entitled to the benefits of being regarded as a creditor of the tortfeasor. He could not avoid the effect of a conveyance made for the express purpose of avoiding his claim, which would be void under the statute against fraudulent conveyances as to creditors. And he could not claim to recover a penalty inflicted against debtors for fraudulent conveyances, to be recovered only by creditors. This point as to the claimant for damages in tort being entitled to the benefit of the provisions of the statute against fraudulent conveyances was so determined at an early day in Connecticut by a divided court: *Fox* v. *Hill*, 1 Conn. 295; *Fowler* v. *Frisbie*, 3 Id. 321.

But after a tort goes into judgment it becomes a debt, and we see no good reason why the relation of debtor and creditor may not fairly be regarded as thereafter existing between the parties to such judgment. That is expressly decided in *Pelham* v. *Aldrich*, 8 Gray 515, in regard to a bill of costs recovered by defendant in a writ of entry.

We think, indeed, that no one can question that the sheriff may levy an execution issued upon a judgment in an action of tort, upon personal property not so transferred as to vest the title as

against creditors. We do not think any court would be inclined to make any distinction between the rights of judgment-creditors on the ground of the original cause of action. This rule of law, regarding the sale of personal property as incomplete until after a visible substantial transfer of possession to the vendee, is for the security of officers as well as creditors, that there may be some known evidence of title by which they may be able to determine the duty which the law imposes, as to levying on it.

Whether the same rule should be extended to officers making distress for taxes is perhaps not equally clear. The English rule in regard to distress is far more sweeping than in regard to the levy of a *fieri facias*. A distress attaches to all property in the possession of the party in default. That is certainly so in regard to distress for rent in arrear, and there is no reason why the rule should not extend to distress for taxes. The distinction made in favor of creditors in the principal case may be founded upon valid considerations. But we generally feel averse to making distinctions in the law, unless upon grounds which commend themselves to the common mind. I. F. R.

Supreme Court of Alabama.

MOBILE AND OHIO RAILROAD CO. *v.* THOMAS.

It is not the absolute duty of a railroad company to furnish a safe engine. Its duty is to use care and diligence to furnish such an engine.

When an injury has occurred to a servant in consequence of a defect in an engine, the burden is on the servant to show negligence in the master, and it is not shifted by the fact that an injury has resulted from a defect.

Notice to the proper officers or servants of the company is notice to the company, and will render it liable unless it uses proper diligence in repairing the defect; but if it has made an effort by a competent servant to repair, it is not liable. Failure to remedy the defect does not conclusively prove negligence on the part of the workman, and if it did, he is a fellow-servant of the plaintiff, for whose negligence the company is not liable.

THE defendant in error, who was plaintiff below, was a fireman in the railroad company's employ. While on duty on a train, the engine broke down from some defect in itself, and the plaintiff was injured. Evidence was given at the trial tending to show that the engine, which was run on a "Mason side-bearing truck," was of a kind known to be unsafe; that this particular one had broken down several times before, and that the assistant-superintendent and master mechanic of the shop had been informed of this when it occurred.

The defendant offered evidence that the side-bearing truck was